No. 22,345

IN THE

United States Court of Appeals

For the Ninth Circuit

GARY PETTIT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court
for the District of Nevada

APPELLEE'S ANSWERING BRIEF

JOSEPH L. WARD,
United States Attorney
ROBERT S. LINNELL,
Assistant United States Attorney
300 Las Vegas Boulevard South
Las Vegas, Nevada
Attorneys for Appellee.

Subject Index

Table of Authorities Cited

Cases

Statutes

No. 22,345

IN THE

United States Court of Appeals

For the Ninth Circuit

GARY PETITTI,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the District of Nevada

APPELLEE'S ANSWERING BRIEF

I. STATEMENT OF JURISDICTIONAL FACTS

This is an appeal from an order of the United States District Court for the District of Nevada denying Appellant's motion under Title 28, United States Code, Section 2255, under which section the District Court had jurisdiction.

This Court has jurisdiction of such an appeal pursuant to the provisions of Title 28, United States Code, Section 2255, Section 1291, and Section 1294.

II. STATEMENT OF THE CASE

On May 16, 1967, Appellant filed a motion to set aside sentence, pursuant to 28 USC 2255 (R. 2).[1] As

[1] "R" as used herein refers to the Record on Appeal.

is apparent from said motion, Appellant was convicted in United States District Court for the District of Nevada upon a plea of guilty to an Information charging him with a violation of Title 26, United States Code, Section 4704(a) (sale of narcotic drugs not from original stamped package). The motion further reflects, correctly, that on July 11, 1966, pursuant to the aforementioned plea, the Appellant was sentenced to the custody of the Attorney General for imprisonment for a period of ten years, subject, however, to parole eligibility under the provisions of Title 18, United States Code, Section 4208(a)(2).

At the time of sentence, the District Court recommended, as a part thereof, that Appellant be committed to a federal facility where he could receive treatment for his narcotic addiction (T. 12, L.12).[2]

On June 30, 1967, the District Court held a hearing on Appellant's motion to vacate sentence, at which it became apparent that following his sentence, Appellant was incarcerated at the Federal Correctional Institution, Terminal Island, California, and later transferred to the United States Penitentiary at McNeil Island, Steilacoom, Washington (T. 9, L. 21). Upon Appellant's incarceration at McNeil Island, he commenced a program of vocational training in the electrical field (T. 12, L. 16-25; Exhibit 1; Exhibit A). As of the date of the aforementioned hearing, Appellant had not received medical or psychiatric treatment for his addiction (T. 12, L. 15).

---

[2]"T" as used herein refers to the Reporter's Transcript of Proceedings of June 30, 1967.

As apparent from the exhibits, the policy of the Bureau of Prisons is to consider treatment for addiction immediately prior to release, not upon incarceration, and the District Court specifically found that although the Appellant entered his plea of guilty to the criminal charge with the *hope* that he would immediately receive hospital treatment, the plea was nevertheless entered unconditionally, freely and voluntarily (R. 11).

The wisdom of the policy of the Bureau of Prisons is supported somewhat by the Appellant's own statement that during the past year he had had no drugs nor did he feel any need for them (T. 23, L. 9).

In prosecuting this appeal, Appellant has specified that the District Court erred in its determination that Appellant's plea to the criminal charge was not conditioned on his being immediately committed to a hospital for treatment (Opening Brief, p. 5).

III. SUMMARY OF ARGUMENT

Appellant's plea of guilty was freely, voluntarily, and unconditionally made.

IV. ARGUMENT

APPELLANT'S PLEA OF GUILTY WAS FREELY, VOLUNTARILY, AND UNCONDITIONALLY MADE.

Appellee will concede that at the time of Appellant's entering his plea, it was his hope and urgent desire that he be forthwith committed to a Government hospital facility for treatment of his narcotic addiction. Questioning of the Appellant at the hearing clearly established that no actual representation was ever made to him concerning what sentence he might receive (T. 16, L. 11-T 17, L. 19). And at the time defendant was given his opportunity to make a statement in mitigation of sentence, he stated that he would like to go to a hospital for treatment (T. 18, L. 12), thus indicating to some extent, at least, that at that point in time he had not been assured hospitalization.

As counsel for the Appellant candidly points out (Opening Brief, p. 7), this Court has held that one's disappointment with his sentence is not grounds for permitting him to withdraw his plea of guilty. *Pinedo v. United States,* 9 Cir. 1965, 347 F.2d 142, cert. den. 382 U. S. 976. As the Court indicated in *Pinedo,* a District Court's denial of a petition under 28 USC 2255 should be disturbed only when such determination is clearly established by the record to be manifestly unjust. See also *Gilmore v. People of the State of California,* 9 Cir. 1966, 364 F.2d 916.

V. CONCLUSION

Based upon the entire record herein and in view of the foregoing arguments, it is urged that the District Court's denial of Appellant's petition was not manifestly unjust and, therefore, the determination of the District Court should be affirmed.

Dated, Las Vegas, Nevada,
April 22, 1968.

Respectfully submitted,

JOSEPH L. WARD,
United States Attorney,
ROBERT S. LINNELL,
Assistant United States Attorney,
Attorneys for Appellee.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

ROBERT S. LINNELL,
Assistant United States Attorney,
Attorney for Appellee.